LIBRARY
SUPREME COURT, U. S.

FILED
SEP 21 1974
MICHAEL RODAK, JR., C

IN THE

# Supreme Court of the United States

OCTOBER 1974

No. 74-317

EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STUART WILLIAMS, MARVIN CAMERON, JENNIE SIMS,

Petitioners,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS AND APPELLATE DIVISION OF THE STATE OF NEW YORK

DILLER & SCHMUKLER
Attorneys for Petitioners
299 Broadway
New York, New York 10007
(212) 349-5554

LAWRENCE STERN
Of Counsel

(4330)

COUNSEL PRESS

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 3 |
| JURISDICTION | 4 |
| QUESTIONS PRESENTED | 4 |
| STATEMENT | 6 |
| REASONS FOR GRANTING THE WRIT | 19 |
| CONCLUSION | 56 |
| APPENDIX | |
| Judgment and opinion of the Supreme Court of the State of New York | A |
| Judgments and opinions of the Appellate Division of the State of New York | B |
| Certificate of the Court of Appeals of the State of New York, denying leave to appeal | C |
| Search Warrant and Affidavit | D |

## CITATIONS


| | Page |
|---|---|
| CASES: | |
| Aguilar v. Texas, 378 U.S. 108 | 43 |
| Alderman v. United States, 394 U.S. 165 (1968) | 21 |
| Alford v. United States, 282 U.S. 687 (1931) | 36 |
| Beck v. Ohio, 379 U.S. 89 | 43 |
| Bellis v. United States, 94 S.Ct. 2179 (1974) | 29 |
| Bowles V. United States, 439 F.2d 536 (D.C. Cir., 1970) cert. den. 401 U.S. 995 | 41 |
| Campbell v. United States, 365 U.S. 85 (1968) | 22 |
| Chambers v. Mississippi, 410 U.S. 284 (1973) | 36 |
| Christoffel v. United States, 200 F.2d 734 (D.C. Cir., 1953) | 22 |
| Davis v. Alaska, 94 S.Ct. 1105 (1974) | 23 |
| Dennis v. United States, 384 U.S. 855 (1965) | 22 |
| Draper v. United States, 358 U.S. 307 | 43 |

## CITATIONS (cont.)


| | Page |
|---|---|
| Edwards v. United States, 312 U.S. 473 (1941) | 21 |
| Garner v. Broderick, 392 U.S. 273 (1967) | 26 |
| Goldberg v. Kelly, 397 U.S. 254 (1969) | 28 |
| Greene v. McElroy, 360 U.S. 474 (1959) | 22 |
| People v. Brown, 24 N.Y. 2d 421 (1969) | 52 |
| People v. Corrado, 22 N.Y. 2d 308 (1969) | 48 |
| People v. Lawrence, 31 A.D. 2d 713 (3rd Dept., 1968) | 49 |
| People v. Malinsky, 15 N.Y. 2d 86 (1965) | 53 |
| People v. Merola, 30 A.D. 2d 963 (2d Dept., 1968) | 49 |
| People v. Rainer, 14 N.Y. 2d 35 (1968) | 49 |
| People v. Ramistella, 306 N.Y. 379 (1954) | 23 |
| Rochin v. California, 342 U.S. 165 (1952) | 34 |

CITATIONS (cont.)


| | Page |
|---|---|
| Rogers v. United States, 340 U.S. 367 (1951) | 30 |
| Sibron v. New York, 392 U.S. 40 | 43 |
| Snyder v. Massachusetts, 291 U.S. 97 (1934) | 28 |
| Spinelli v. United States, 393 U.S. 410 | 43 |
| United States ex. rel. Carthan v. Sheriff, 330 F.2d 100 (2d Cir., 1964) cert. den. 379 U.S. 929 | 30 |
| United States v. Andolschek, 142 F.2d 503 (2d Cir., 1944) | 23 |
| United States v. Beekman, 155 F.2d 580 (2d Cir., 1946) | 22 |
| United States v. Cardillo, 316 F.2d 606 (2d Cir., 1963) cert. den. 375 U.S. 822 | 31 |
| United States v. Carmichael, 489 F.2d 983 (7th Cir., 1973) | 37 |
| United States v. Clark, 475 F.2d 240 (2d Cir., 1973) | 27 |
| United States v. Coplon, 185 F.2d 629 (2d Cir., 1950) cert. den. 342 U.S. 920 | 22 |
| United States v. Grayson, 166 F.2d 862 (2d Cir., 1948) | 23 |

CITATIONS (cont.)


| | Page |
|---|---|
| United States v. Hayman, 342 U.S. 205 (1952) | 28 |
| United States v. Hinton, 219 F.2d 324 | 49 |
| United States v. Hoggett, 438 F.2d 396 (2d Cir., 1971) | 36a |
| United States v. Nixon, Nixon v. United States, 15 Cr. L. 3329 (Nos. 73-1766, 1834, decided July 24, 1974) | 24 |
| United States v. Seewald, 450 F.2d 1159 (2d Cir., 1971) cert. den. 405 U.S. 978 | 30 |
| United States v. Thomas, 489 F.2d 664 (5th Cir., 1973) | 37 |


CONSTITUTIONAL AMENDMENTS:


Fourteenth Amendment

Fifth Amendment

Fourth Amendment

Sixth Amendment

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

---

NO.

---

EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STUART WILLIAMS, MARVIN CAMERON, JENNIE SIMS,

Petitioners,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

---

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Edith May Cameron, Stanley Taylor Sims, Kenneth Davis, Robert Stewart Williams, Marvin Cameron, and Jennie Sims, petitioners herein, respectfully pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

---

NO.

---

entered on May 29, 1974, denying leave to appeal to that Court, and the judgments and orders of the Appellate Division of the State of New York, entered on May 6, 1974, and December 29, 1972, affirming judgments of the Supreme Court of the State of New York, rendered on May 15, 1972, convicting petitioners, Robert Williams and Marvin Cameron on their pleas of guilty to criminal possession of a dangerous drug in the second degree and sentencing them to 15 years imprisonment, convicting petitioners Stanley Sims and Kenneth Davis on their pleas of guilty to criminal possession of a dangerous drug in the third degree and sentencing them to 15 years and 12 years imprisonment, respectively, and convicting petitioners Jennie Sims and Edith May Cameron on

their pleas of guilty to criminal possession of a dangerous drug in the sixth degree and sentencing them to a fine of $1000 and a period of probation not to exceed three years.

## OPINIONS BELOW

The Court of Appeals of the State of New York denied leave to appeal without opinion. The Certificate Denying Leave is attached hereto as Appendix C.

The first judgment of the Appellate Division was rendered in an opinion officially reported as People v. Cameron, et al, 40 A.D. 2d 1035 (2d Dept., 1972) and attached hereto in Appendix B. The second order and judgment was rendered in an opinion officially reported as People v. Cameron, et al, 44 A.D. 2d 355 (2d Dept., 1974) and attached

their pleas of guilty to criminal possession of a dangerous drug in the sixth degree and sentencing them to a term of 1500 and a period of probation not to exceed three years.

ORDERING ACTION

The Court of Appeals of the State of New York denied leave to appeal without opinion. The Certificate Denying Leave is attached hereto as Appendix C.

The first judgment of the Appellate Division was rendered in an opinion officially reported as People v. Cameron, et al, 40 A.D. 2d 1033 (2d Dept., 1973) and attached hereto in Appendix B. The second order and judgment was rendered in an opinion officially reported as People v. Cameron, et al, 44 A.D. 2d 355 (2d Dept., 1974) and attached

hereto as Appendix B.

## JURISDICTION

The order of the Court of Appeals of the State of New York was entered on May 29, 1974. By order of the Honorable Thurgood Marshall, Associate Justice of this Court, entered on July 20, 1974, time to file the instant petition was extended to September 23, 1974.

The orders of the Appellate Division of the State of New York were entered on December 29, 1972, and May 6, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

## QUESTIONS PRESENTED

1. Whether the State, acting through its law enforcement officer-agent, may deprive defendants in a criminal proceeding of the 14th, 5th, 4th,

hereto as Appendix B.

## JURISDICTION

The order of the Court of Appeals of the State of New York was entered on May 20, 1974. By order of the Honorable Thurgood Marshall, Associate Justice of this Court, entered on July 10, 1974, time to file the instant petition was extended to September 23, 1974.

The orders of the Appellate Division of the State of New York were entered on December 29, 1972, and May 6, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

## QUESTIONS PRESENTED

1. Whether the State, acting through its law enforcement officers, may deprive defendants in a criminal proceeding of the 14th, 5th,

and 6th Amendment rights to a fair hearing and due process of law, freedom from arbitrary and unreasonable police search and seizure, effective assistance of counsel, compulsory process, and confrontation of witnesses, by improperly invoking, and indicating it would invoke, the 5th Amendment privilege against self-incrimination, and declining to respond to questions about theft of seized contraband and the truthfulness of a search warrant affidavit, questions relevant to the integrity of the criminal justice process in the case and the bias, motives and veracity of the officer in the performance of his police duties both as a witness at the hearing and in his conduct of the seizure and application for a search warrant.

2. Whether the facts presented by the officer in his affidavit contained

sufficient probable cause upon which a search warrant could issue.

## STATEMENT

Petitioners Edith Cameron, Stanley Sims, Kenneth Davis, Robert Williams and Marvin Cameron were indicted in the Supreme Court of the State of New York for the crimes of criminal possession of a dangerous drug in the first degree, promoting gambling in the first degree, and possession of gambling records in the first degree. Petitioners Edith and Marvin Cameron were additionally charged with possession of weapons and dangerous instruments as a misdemeanor. Petitioner Jennie Sims was indicted separately for the crimes of promoting gambling in the first degree and possession of weapons and dangerous instruments as a misdemeanor.

Prior to the introduction of their

guilty pleas (Williams and M. Cameron, 2d degree drug possession; S. Sims and Davis, 3rd degree drug possession; J. Sims and E. Cameron 6th degree drug possession), petitioners moved to controvert the search warrant and have the evidence suppressed because of police perjury and fraudulent conduct and the absence of probable cause for the issuance of the warrant. The motions were denied in the trial court; petitioners pleaded guilty, and, in its first order, the Appellate Division affirmed the trial court's finding of probable cause, but given defense counsel's averment that Knapp Commission testimony resulted in a Federal Grand Jury investigation of the arresting officers in this case wherein these officers had pleaded the 5th Amendment, the court ordered a hearing on the allegations of police

perjury and misconduct. (People v. Cameron, et. al, 40 A.D. 2d 1035, 2d Dept., 1972; See Appendix). After a hearing conducted pursuant to the Appellate Division remand, the Supreme Court denied petitioners' motion to controvert the warrant on grounds of perjured police testimony and misconduct, and the Appellate Division affirmed, with opinion (People v. Cameron, 44 A.D. 2d 355, 2d Dept, 1974; See Appendix). The Court of Appeals declined to hear the case.

The following is a summary of the hearing testimony that forms, along with the attached search warrant and affidavit, the factual basis for the issues to be argued:

Patrolman Lucido Bonino testified that he was an expert on policy (4-5).*

* Numerical references are to the minutes of the suppression hearing.

On May 18, 1971, he and a brother officer were investigating petitioner Stanley Sims. He did not recall on how many occasions prior to May 18, he had seen Sims, nor the approximate dates. He did not produce any prior reports made on Sims. He was unable to produce his memo book for May 18, the only day's observations detailed in the search warrant affidavit (6-9, 46-48, 12). Only after reading the search warrant was the Patrolman's recollection refreshed and was he able to testify to the circumstances related therein. He arrived in the vicinity of the Sims' residence at about 11:00 A,M,, but he could not remember where his car was parked (9-12). Sims left his residence, entered a car, and drove to the petitioners' Camerons residence.

The court interrupted during this

line of examination, and, although there had been no prior suppression hearing, the court ruled, "You are not going to go through the whole hearing _____ ... We are not going to go through the whole observation until you have something to indicate that perjury was made here" (13-18). Counsel objected to the interruption and argued,

> there is testimony to be adduced at this trial to indicate that the statements of the officer, of his observations were indeed not truthful and indeed never occurred, and, therefore, a perjured affidavit was submitted application [sic] for a search warrant. This is in conjunction with other questions of the credibility of the officer (16).

At this point defense counsel was directed to lay a foundation connecting testimony as to these events with his allegations that a Knapp Commission witness had said the officer had com-

mitted perjury with regard to this case. The Patrolman admitted being subpoenaed before a State, Queens County, Grand Jury in regard to this case, but he then took the Fifth Amendment when asked if he had been similarly subpoenaed by a Federal Grand Jury. After recess the hearing was adjourned to permit the officer to appear with counsel, pursuant to application of the District Attorney (15-22).

The officer subsequently appeared with counsel (27), and he was cautioned to confer only with his counsel, not to look for comment from the two new Assistant District Attorneys who were brought into the case after the recess. Defense counsel, arguing, "who are my adversaries in this case?" stated to the judge that he had seen the witness looking to the prosecutor for comment

before answering questions (30).

Honoring the new District Attorney's belated objection to the last question put before the recess, the Court struck the Patrolman's 5th Amendment answer and counsel asked again if he had testified before a Federal Grand Jury.

He said he was subpoenaed by a Federal Grand Jury but "I don't believe there were any questions asked regarding the Sims case. If there were, I did invoke my constitutional privileges" (31).

Over objection by the District Attorney that these questions were immaterial, the officer testified that when Sims was arrested a large amount of drugs and currency was seized at his residence (32-33). Although the court continued to permit the questions

over DA objection, the Patrolman then invoked the Fifth Amendment and refused to answer questions as to whether any seized drugs, currency or jewelry was not turned over to the Police Property Clerk (34-37). He refused to answer similar questions with regard to unreported seizures of drugs, currency, or jewelry from the Cameron residence (38, 40-41).* Furthermore, he refused to answer whether he had seized and kept any drugs not noted on the inventory made on the return of the warrant (39-40).

When asked if he had been questioned on the same subjects in the

---

* He denied that the real reason he got a search warrant for the Sims and Cameron homes was to steal money he believed was present there (43).

Federal Grand Jury and, if he had been questioned there about the truthfulness of the affidavit he submitted for a search warrant, he replied, "As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges" (41).

He said he had made notes of the observations on May 18, 1971* that he later put in the affidavit but he did not believe he put these in his memo book and he probably threw them away (44-45). His memo book for May 19, 1971 said only "1115 hours to approxi-

---

* His affidavit for the warrant recited observations on May 18, 19 and 20, 1971. Only for May 18 (the date for which no memo was available) were Sims' actions detailed in the affidavit; for the 19th and 20th it was merely said that the May 18 actions were repeated "to the letter."

mately 1545 hours, vicinity of Linden and 197th and Farmers and New York regarding search warrant observation;" none of his specific observations were in the memo book and he did not know if Police Department regulations required that such observations be written down (49-50).

Although he could not remember numerous details, the officer was able, after looking at his affidavit, to testify that on May 18, 19, and 20 he saw petitioner Sims receive what he believed were policy bets at the front door of his and the Camerons' house (55-67).

Toward the end of counsel's examination of the witness the Court interrupted the examination:

> What do you want him to do, contradict the statements he made in the affidavit and

everytime you ask him a question he looks at the affidavit to answer you? (69)

Henry Schnitzer testified that he was an expert on "policy" (72). He testified that in playing policy no one takes policy bets after the time that the third race is finished because after that race is finished the first number of the day's policy number can be ascertained (74-76). Therefore, no policy banker would take a bet after 2:00 P.M. (76) (and officer Bonino said he saw Sims allegedly taking policy slips after 3:00 P.M. [65]).

Edith Cameron testified that contrary to officer Bonino's testimony no one other than Stanley Sims entered her home between 11:30 A.M. and 2:30 P.M. on May 18, 1971; Sims stayed through the evening when the rest of the

petitioners also arrived (79-80).

Juanita (Jennie) Sims also testified that, contrary to officer Bonino's testimony, no one came to her home on May 18, 1971 between 2:55 and 3:30 P.M. (82).

Both sides then rested, the District Attorney having declined to present any evidence (84).

On the basis of the above testimony, and the lack of it under the Fifth Amendment, the trial court ruled that petitioners had not sustained their burden of proving perjury. The Appellate Division affirmed this ruling. While recognizing that,

> The remand was predicated on the allegations of the defense that the affidavit contained perjurous statements and that the officer had refused to testify before a Federal Grand Jury inquiring into his official conduct on

> the ground that his testimony might incriminate him, (emphasis supplied),

the Appellate Division seemed to rest its decision on the ground that the police theft of seized contraband in this case was irrelevant to the judicial inquiry. Despite the officer's own testimony that he would take the Fifth Amendment if asked whether his affidavit were truthful, the Appellate Division stated, "all of the police officer's refusals to answer dealt with occurrences which took place after the seizure under the warrant." (See Appendix for full text of the opinion).

As to the question of probable cause for the issuance of the warrant based on the face of the officer's affidavit, (See copy attached hereto), the Appellate Division simply affirmed

the trial court's finding of probable cause.

## REASONS FOR GRANTING THE WRIT

The writ should issue because the State, acting through it law enforcement officer-agent, deprived a defendant in a criminal proceeding of the 14th, 5th, 4th, and 6th Amendment rights to a fair hearing and due process of law, freedom from arbitrary and unreasonable police search and seizure, effective assistance of counsel, compulsory process, and confrontation of witnesses, by improperly invoking, and indicating it would invoke, the 5th Amendment privilege against self-incrimination, and by declining to respond to questions about theft of seized evidence from the defendants'

homes and the truthfulness of a search warrant affidavit, questions relevant to the integrity of the criminal justice process in the case and the bias, motives and veracity of the officer in the performance of his police duties both as a witness at the hearing and in his conduct of the seizure and application for a search warrant.

The writ should further issue because the facts presented by the officer in his affidavit contained insufficient probable cause upon which a search warrant could issue.

I

In a criminal proceeding, especially when "the spectre of police corruption was raised here and justice

required a hearing at which the facts could be fully aired" (Appellate Division opinion, 40 A.D. 2d 1035, See Appendix), the State's refusal to respond to the judicial inquiry and provide evidence totally within its custody and control mandated reversal of the prosecution instituted by that same government, Edwards v. United States, 312 U.S. 473 (1941) (government refusal to provide defendant with copy of his SEC testimony when defendant requested it to show compelled incrimination, required reversal of conviction). As this Court stated in Alderman v. United States, 394 U.S. 165, 184 (1968):

> It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third party interests. But

> this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant.

A long line of precedent upholds the obligation of the state to respond to relevant subpoena in prosecutions it initiates and to give testimony and evidence which it controls, or else forfeit that prosecution. Dennis v. United States, 384 U.S. 855 (1965); Green v. McElroy, 360 U.S. 474, 496-497 (1959); United States v. Coplon, 185 F.2d 629 (1950) (L. Hand, J.) cert. den. 342 U.S. 920; Campbell v. United States, 365 U.S. 85, 96 (1968); Christoffel v. United States, 200 F.2d 734 (D.C. Cir., 1953); United States v.

Beekman, 155 F2d 580 (2d Cir., 1946); United States v. Andolschek, 142 F2d 503 (2d Cir. 1944); People v. Ramistella, 306 N.Y. 379 (1954). As Judge Learned Hand put it,

> a conviction should not stand when the accused has been denied access to documents relevant to his defense which are in the possession of a department of the Government, whose regulations make them unavailable at the trial.
>
> United States v. Grayson, 166 F.2d 863, 870 (2d Cir., 1948).

Recently this Court has reaffirmed the paramount necessity for disclosure of evidence in the control of the government in two cases where, unlike the instant case, the government had, at least, an arguably legitimate interest in the withholding of the evidence. In Davis v. Alaska, 94 S.Ct. 1105 (1974), this Court reversed a

criminal conviction and held that

> the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as juvenile delinquent [even] when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.
>
> 94 S.Ct. 1105 at 1107

And, in United States v. Nixon, Nixon v. United States, 15 Cr. L3329 (Nos. 73-1766, 1834, decided July 24, 1974), this Court held

> To read the Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes, would upset the constitutional balance of 'a workable government' and gravely impair the role of the Courts under Article III ... it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.
>
> 15 Cr.L.3329 at 3337

Thus, if the legitimate governmental interests embodied in the privileges against disclosure of juvenile delinquency and confidential executive communications must give way to the demand for evidence in criminal proceedings, then in this case where the State can offer no legitimate interest of its own for withholding the evidence of its agent's corruption in the performance of his duties, the prosecution must fail.

In this case, a policeman, who this Court has said

> is directly, immediately, and entirely responsible to the city or State which is his employer. He owes his entire loyalty to it. He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total

> responsibility to his public employer ... the policeman is either responsible to the State or to no one. (Garner v. Broderick, 392 U.S. 273, 277-278 (1967)),

invoked a 5th Amendment privilege against giving evidence of his own corruption in the performance of his official duties. This claim of privilege by this policeman, the representative of State action in the instant case, is a claim of 5th Amendment privilege by the State of New York, and, as such, may not be recognized by the Courts to permit the State to cover-up and withhold evidence of its own wrongdoing. If the violation of an individual's Constitutional rights during his investigation and prosecution for criminal acts can result in the exclusion of evidence and the voidance of the prosecution, and if

the Courts are not to become party to cases made by the State on the basis of corrupt police practices, then the State cannot avail itself of a privilege which would effectively preclude judicial scrutiny of State corruption. This would apply especially in pre-trial suppression hearings where the very issue to be litigated is police violation of the law, where the search for truth is just as well served by full disclosure of the evidence as in a criminal trial and where, "disposition of the motion to suppress is as important as the trial itself since granting of the motion may require entry of a judgment of acquittal for lack of other proof sufficient to convict." United States v. Clark, 475 F.2d 240, 247 (2d Cir., 1973);

United States v. Haymon, 342 U.S. 205 (1952); Snyder v. Massachusetts, 291 U.S. 97, 106-107 (1934); cf. Goldberg v. Kelley, 397 U.S. 254 (1969). In addition, this Court has held that large corporate entities, among which the states are the largest, have no 5th Amendment privilege, and that their agents and representatives may not invoke the privilege with respect to their corporate duties, regardless of consequent personal incrimination.

> 'individuals, when acting as members of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by it obligations.' Since no artificial organization may utilize the personal privilege against compulsory self-incrimination, the Court [in United States v. White, 322 U.S.

United States v. Bowman, 347 U.S. 205 (1954); Bowden v. Pennsylvania, 291 U.S. 97, 106-107 (1934); cf. Woldberg v. Kelly, 397 U.S. 254 (1969). In addition, this Court has held that large corporate entities, among which the states are the largest, have no 5th Amendment privilege, and that their agents and incorporations may not invoke the privilege with respect to their corporate duties, regardless of consequent personal incrimination.

Individuals, when acting as members of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to claim purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. Since no artificial organization may utilize the personal privilege against compulsory self-incrimination, the Court [in United States v. White, 322 U.S.

> 694 (1944)] found that it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege ... The framers of the constitutional guarantee against compulsory self-disclosure who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.
>
> Bellis v. United States, 94 S.Ct. 2179, 15 Cr.L. 3111, 3112-3113 (No. 73-190, decided May 28, 1974).

We submit, then, that the State of New York, in the person of its policeman, could not avail itself of the 5th Amendment privilege because it had none under the law and Constitution as interpreted by this Court, and that even if the policeman's invocation of the privilege was

proper for his personal protection,* the State has consequently deprived the defense of necessary and relevant information in its control and the conviction must be reversed. Furthermore, the State, by initiating this prosecution and presenting to the courts seized evidence and a search warrant arguably valid on its face, having, in effect, gone forward with a prima facie attestation to the legitimacy

---

* On information and belief, the police officer may already have testified before the State grand jury about the events of the search and seizure, and the items he confiscated, and he certainly made a return on the warrant, possibly sworn, which resulted in a waiver of his privilege. Rogers v. United States, 340 U.S. 367 (1951); United States v. Seewald, 450 F.2d 1159, 1164 (2d Cir., 1971) cert. den. 405 U.S. 978; United States ex rel. Carthan v. Sheniff, 330 F.2d 100 (2d Cir., 1964) cert. den. 379 U.S. 929.

of its actions, has waived any 5th Amendment privilege as to the facts and underlying circumstances of the search and seizure. Its insistence on the 5th Amendment, or the insistence of its agent-witness, requires that its prima facie attestation be stricken and the evidence suppressed. Rogers v. United States, 340 U.S. 367 (1951) United States v. Cardillo, 316 F.2d 606 (2d Cir., 1963) cert. den. 375 U.S. 822.

Contrary to the opinion of the Courts of New York State, the officer's refusal to answer questions about his seizure of evidence from petitioners' homes, and about his disposition of that evidence, and his clear statement of intention to refuse to answer whether the statements in his affidavit were truthful, deprived petition-

ers of the opportunity to adequately meet their burden of proving the perjury and misconduct of this officer, and of doing it through his bias, motives and incredibility as a witness in court at the hearing and in his affidavit. The defense had gone forth with the testimony of other witnesses who happened, as will usually be the case, to be the defendants in the case and whom the trial court chose outright and expressly to disbelieve (See its opinion after the hearing at Appendix A). The defense presented an attorney witness, an expert on gambling activities, who said the events could not have happened the way the officer said they happened, and whom the trial court disregarded. It was conceded that there

had been Knapp Commission testimony about this officer and a Federal Grand Jury investigation at which he had taken the 5th. But, the officer himself was the chief witness, especially since the trial court automatically discounted the evidence from the defendants. The defense had to call the chief witness, who was also their adversary and accuser, in a situation where the very issue to be determined was the veracity of this witness. In this sui generis circumstance ("In addition to the consideration that the interest of the United States in a criminal prosecution ... 'is not that it shall win a case, but that justice shall be done ...' ..., the ordinary rule, based on considerations of fairness, does not place the burden

upon a litigant of establishing facts peculiarly within the knowledge of his adversary." Campbell v. United States, 365 U.S. 85, 96 (1960)), the State courts held to a narrow conception of the scope of the examination, to the extent of ruling irrelevant questions designed to show misconduct directly related to the search warrant in question, misconduct and cheating which would, by any civilized standard of police conduct, make the witness unworthy of the office, let alone believable as a witness, misconduct that shocks the conscience by itself and to the extent that the courts amplify the miscarriage by ignoring it (cf Rochin v. California, 342 U.S. 165 (1952)), and misconduct which, if true, required the officer to lie to his

superiors about what he had seized, lie to the court on the return of the warrant, lie to the grand jury, and obviously lie to the trial court at the hearing, and misconduct, if true, that would clearly bear on his motives to falsify a search warrant to get at money and drugs which he had intention to steal. This was a hostile witness in the true sense of the term, and counsel, to be effective, had to be able to call him and examine and cross-examine him to give the fact-finder a true picture of the man who signed the warrant affidavit and to delve behind the officer's mere reading of the affidavit as his testimony.

The availability of the right to confront and

to cross-examine those who give damaging testimony against the

> accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State.
> Chambers v. Mississippi, 410 U.S. 284, 297-298 (1973); See proposed Rules of Evidence 607.

And, this Court has held that veracity, bias and motives are an essential ingredient of the right of cross-examination and that the cross-examiner should be given great leeway in the exploration of that subject. Alford v. United States, 282 U.S. 687 (1931); Davis v. Alaska, supra. Surely questions concerning the officer's prior bad acts connected specifically to the execution of the warrant he is alleged to have perjured, prior bad acts of perjury bearing directly on the issue of his perjury in this proceeding and on his motives to falsify the affidavit were not outside the scope of the right

of cross-examination. United States v. Hoggett, 438 F.2d 396 (2d Cir., 1971) cert. den. 402 U.S. 946. Nor were these questions irrelevant to the substantive issue of the suppression of the evidence, even if one assumes they were immaterial to the validity of probable cause in the affidavit. Two Circuit Courts of Appeal have held recently that in cases of intentional misstatement of fact by a police affiant, regardless of the materiality of that fact to the finding of probable cause, the warrant will be invalidated and the evidence seized suppressed: "if

(cont. on next page)

deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing." United States v. Carmichael, 489 F.2d 983, 989 (7th Cir., 1973); United States v. Thomas, 489 F.2d 664 (5th Cir., 1973).

This Court said in Davis v. Alaska, supra,

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A Wigmore Evidence §940, at 775 (Chadbourn rev. 1970).

> We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitution Greene v. McElroy, 360 U.S. 474, 496 (1959). 94 S.Ct. 1105 at 1110

The State Courts, in expressing their own disinterest in the answers to which the witness took the 5th Amendment, totally disregarded the possibility of "deliberate government wrongdoing," and petitioners' right to cross-examination; the courts substituted their own prejudgment of the veracity of the witness before hearing all the facts that might bear on that judgment. Although we have argued that admission by the officer of the misconduct pursued in the unanswered questions would have required suppression as a matter of law, the cross-examiner's right to a reasonable lattitude to explore was

also denied. Had admissions of the officer's illegal conduct been extracted in the examination in this case, there is no way to know exactly what effect this would have had on the rest of the witness' testimony or on the court's view of him. "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." Alford v. United States, 282 U.S. 687, 692 (1931).

> Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is

> enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. Dennis v. United States, 384 U.S. 855, 874-875 (1965).

Finally, it must be noted that the police officer indicated he would take the 5th Amendment if asked if his affidavit were truthful.

> Q: Were you questioned in the federal grand jury concerning the truthfulness of the affidavit that you submitted in order to procure a search warrant in this case.
>
> A: As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges (41).

Thus, having once been put on notice by the witness that he intended to invoke the 5th Amendment as to that question before a judicial inquiry, or agency of a judicial inquiry, the

defense did not, as the State Courts would have it, fail in some duty to ask a question which they had every reason to believe would not be answered. Indeed, there is an affirmative duty on a trial examiner not to ask questions which he knows will elicit the invocation of the 5th Amendment privilege against self-incrimination. Bowles v. United States, 439 F.2d 536 (D.C. Cir., 1970) cert. den. 401 U.S. 995. In any case, the defense was entitled to the evidence contained in the answers to the questions they did pose. Since the State deprived the defense of that evidence which, as we have argued, could have itself required suppression as a matter of law or, at least, severly damaged the credibility of the witness and led to other admissions

by him, the State is not absolved of its due process obligation simply because the defense did not ask other questions following the State's refusal to cooperate. The conviction should be reversed and the indictment dismissed, or the case remanded for a hearing at which the officer would be directed to answer the questions related to the search and seizure in this case, and in the event he continues to refuse, the conviction should be reversed and the indictment dismissed.

II

It is clear and well established law that in order for a search warrant to issue, the underlying affidavit must provide a sufficient basis for a

finding of probable cause. Aguilar v. Texas, 378 U.S. 108. The good faith of the police officer is not enough when the information is too subjective or conclusory. Beck v. Ohio, 379 U.S. 89. The observations must objectively constitute probable cause before a warrant may issue, Spinelli v. U.S., 393 U.S. 410, and suspect activity, no matter how reasonable the officer's belief, does not amount to probable cause under the 4th Amendment. Sibron v. New York, 392, U.S. 40.

The officer's statements are required to be of such objective detail that a magistrate may independently make a judicial determination of the existence (or non-existence) of probable cause. Draper v. U.S., 358 U.S. 307.

Upon an examination of the facts

as presented to the Court by the officer, we can conclude no more than the following:

a) With regard to the St. Albans premises, SIMS was seen to leave and return to his residence on three consecutive days. On one of those days, numerous unknown males were seen to come to his door and give him brown envelopes.

b) With regard to the Jamaica premises, on three consecutive days, SIMS was seen being driven to this house and remaining there for a period of hours. On the first occasion, he left and returned to his own home (the St. Albans premises) with a brown paper bag. The unknown callers at St. Albans were not held out to have been gamblers, nor was there any hint

of additional facts supplied by an informant.

The officer concluded that the various brown envelopes delivered to the SIMS home by numerous unknown males were like those commonly used by policy collectors, but indicated no identifying marks, or anything that would characterize or distinguish them from any other brown envelope. In short, the factual basis for this conclusion was not spelled out in the warrant. He reported no overheard conversations between SIMS and these other unknown males and no passing of money or anything other than these equivocal envelopes.

SIMS was "known" to the officer to be involved in policy operations. This conclusion is buttressed only by

the fact that the officer reported that he had been arrested for these charges in the past. There is no mention made of any convictions emanating from these claimed arrests.*

The statement that SIMS was a known gambler is a "bald and unilluminating assertion of suspicion (that) is entitled to no weight." Spinelli v. U.S., 393 U.S. 410, 414 (1969).

The underlying affidavit is virtually barren of any facts from which the magistrate could independently conclude that there was any form of

---

* The facts upon which the officer draws his conclusions that Stanley Sims has a listing of gambling arrests are not specified in the affidavit.
a) the affidavit does not state that he personally made the arrests,
b) the affidavit does not state that he spoke to any arresting officer.

contraband in the brown paper bag carried out of the Jamaica premises, or in the brown envelope allegedly delivered to the St. Albans premises.

The sole basis for suspicion of the Jamaica premises was this innocuous brown paper bag and SIMS' visits for a few hours on three successive days, prior to his return home and the coming of various unknown males to his door with "brown envelopes".

It cannot be suggested that these brown envelopes or paper bags give rise to sufficient probable cause for the issuance of a warrant to search either premises.

In a similar situation, discussing the common use of brown envelopes to transport marijuana, the Court of Appeals, per J. Keating, held that:

"The argument is defective because the envelopes could have contained any number of non-contraband items. This is in sharp contrast to the translucent glassine envelope which has come to be accepted as the tell-tale sign of heroin. Still even in the case of the glassine envelope it has never been held that mere passing of such an envelope establishes probable cause. We conclude, therefore, that the testimony concerning the use of these common envelopes for marijuana does not raise the level of inference from suspicion to probable cause."

* * * *

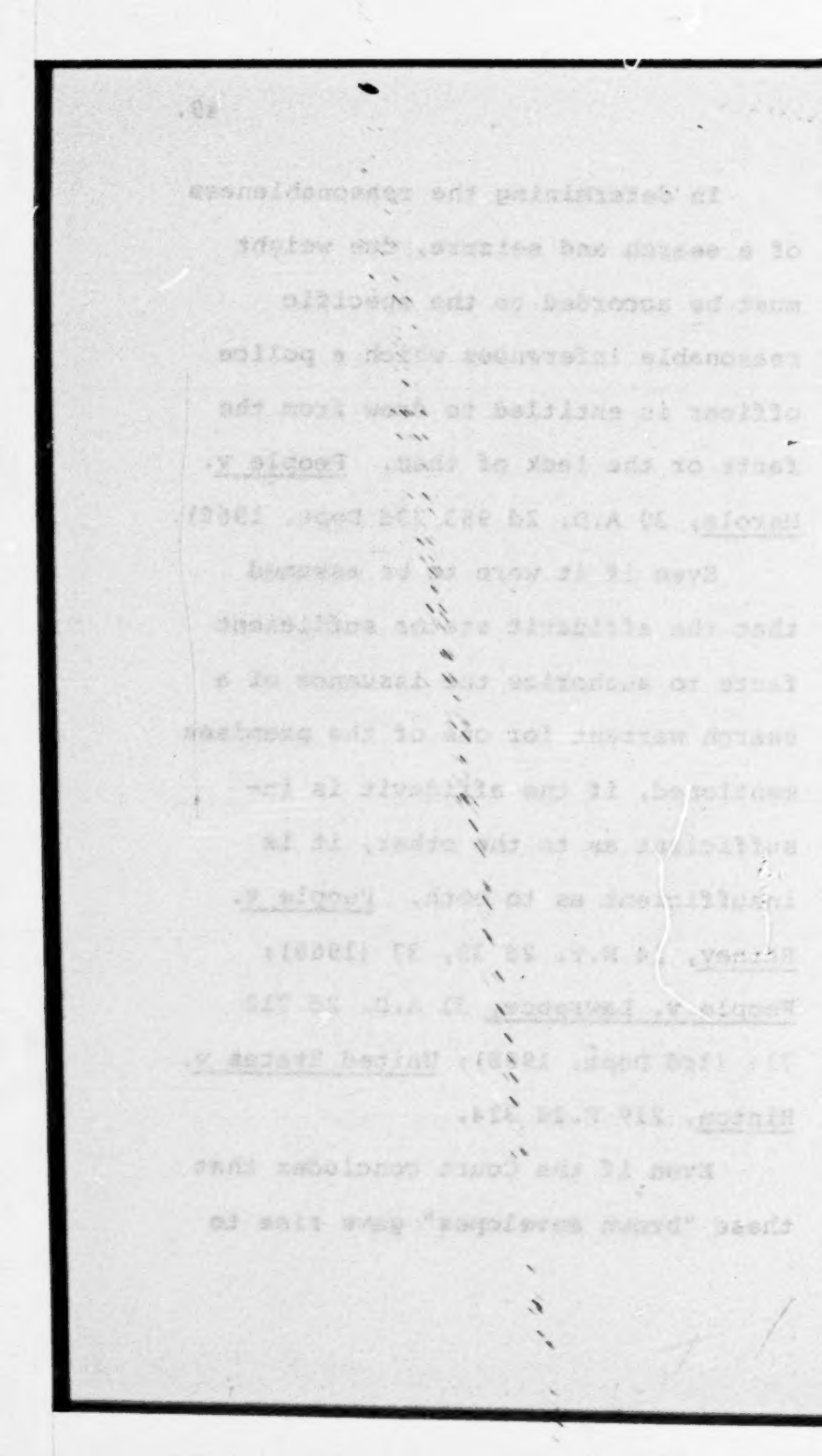
"Thus, where a layman would see absolutely nothing suspicious about the envelopes and the events preceding the arrests, the officer was surely entitled to use his expertise to the contrary. It does not follow, however, that the officer is entitled to draw the inference of criminality when others, possessed of the same special knowledge or expertise, would not."

People v. Corrado, 22 N.Y. 2d 308, 313-314 (1969)

In determining the reasonableness of a search and seizure, due weight must be accorded to the specific reasonable inferences which a police officer is entitled to draw from the facts or the lack of them. People v. Merola, 30 A.D. 2d 963 (2d Dept. 1968).

Even if it were to be assumed that the affidavit states sufficient facts to authorize the issuance of a search warrant for one of the premises mentioned, if the affidavit is insufficient as to the other, it is insufficient as to both. People v. Rainey, 14 N.Y. 2d 35, 37 (1968); People v. Lawrence, 31 A.D. 2d 712 714 (3rd Dept. 1968); United States v. Hinton, 219 F.2d 324.

Even if the Court concludes that these "brown envelopes" gave rise to



sufficient probable cause to believe that SIMS was involved in gambling activities, there is nothing to indicate that the automobile or the CAMERON premises in Jamaica, also mentioned in the warrant, were in any way involved in any illegal activities.

SIMS was never seen to transport these suspicious "brown envelopes" in the automobile, or in any way deliver them to the CAMERON premises. In fact, according to the police observations, the brown envelopes were not in SIMS' possession until after he returned from CAMERON'S home. The only thing SIMS was seen to transport from the CAMERON residence was a common brown paper bag. Certainly, even if it is held that a "brown envelope" has some infamous connotation, the

transportation of a common ordinary shopping bag can be held to be nothing more than total equivocal conduct.

However, since the activity as observed by the affiant is just as consistent with innocent conduct as criminal conduct, the warrant in this case should have been controverted, and the evidence seized as a result suppressed, for as the Court of Appeals has recently stated:

> "Although the observed acts of the defendant and the suspected narcotic addict were not inconsistent with a culpable narcotics transaction, they were also susceptible of many innocent interpretations, even between persons with a narcotics background. The behavior, at most 'equivocal and suspicious', was not supplemented by any additional behavior raising 'the level of inference from suspicion to probable cause.' (See People v. Corrado, 22 N.Y. 2d 308, 311, 313.)

"Thus, for example only, there was no recurring pattern of conduct sufficient to negate inferences of innocent activity (cf. People v. Smith, 21 N.Y. 2d 698; People v. Valentine, 17 N.Y. 2d 128, 132); no overheard conversation between the suspects that might clarify the acts observed (cf. People v. Cohen, 23 N.Y. 2d 674, 295), no flight at the approach of the officer (cf. People v. White, 16 N.Y. 2d 270), and no misstatements when questioned about observed activity (People v. Brady, 16 N.Y. 2d 186).

"The logical and practical problem is that even accepting ungrudingly, as one should, the police officer's expertness in detecting a pattern of conduct characteristic of a particular criminal activity, the detected pattern, being only the superficial part of a sequence, does not provide cause for arrest if the same sketchy pattern occurs just as frequently or more frequently in innocent transactions. The point is that the pattern is equivocal and is neither uniquely nor generally associated with criminal conduct, and unless it is there is no probable cause."

(People v. Brown, 24 N.Y.

2d 421, 423-4 (1969). Also see People v. Malinsky, 15 N.Y. 2d 86 (1965).

It goes without saying that any pattern of conduct observed and noted by affiant with regard to the St. Albans premises was equivocal at best, and nothing at all could possibly be said to have transpired of a criminal nature in the automobile or at Jamaica.

In Spinelli v. U.S., 393 U.S. 410, the affidavit stated that the FBI had observed the defendant's movements for five days, and that on four of these days he had been seen to park his car at some time between 3:30 and 4:45 P.M. in a parking lot of an apartment house, and on one particular day he was seen to enter a particular apartment. The FBI checked with the telephone company and established that

the apartment had two telephones. The affidavit also stated that Spinelli was known to the FBI agent and to Federal law enforcement agents to be a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers. These facts alone, this Court said, signified nothing in the way of probable cause.

This Court added that there is nothing unusual about having two phones in an apartment and there was no abnormal activity observed when Spinelli went to the apartment. An unusual number of telephones might have been of significance as would the appearance of a number of convicted gamblers at the premises. Finally, the fact that Spinelli was "known as a gambler" was of no help. The undescribed

suspicions about a person's reputation "may (not) be used to give additional weight to allegations that would otherwise be insufficient" (393 U.S. pp. 418-419, supra). It followed, therefore, that the Magistrate was not authorized to issue a search warrant on that affidavit.

## CONCLUSION

FOR THE ABOVE STATED REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE ORDERS AND JUDGMENTS OF THE COURT OF APPEALS AND APPELLATE DIVISION OF THE STATE OF NEW YORK.

Respectfully submitted,

DILLER AND SCHMUKLER
Attorneys for Petitioners
299 Broadway
New York, New York 10007
(212) 349-5554

LAWRENCE STERN
Of Counsel

SUPREME COURT,
QUEENS COUNTY
CRIMINAL TERM, PART XII
- - - - - - - - - - - - -x

THE PEOPLE OF THE STATE OF NEW YORK : BY WILLIAM C. BRENNAN, J.

- against - : DATED August 14, 1973

JENNIE SIMS :

and : Ind. No: 2116/71 (Sims)

EDITH CAMERON, et al. :

Defendants. : 2115/71 (Cameron et al)

- - - - - - - - - - - - -x

On appeal from six judgments of this Court all rendered May 15, 1972 (one as to each defendant) convicting them of criminal possession of a dangerous drug upon guilty pleas, the Appellate Division rendered its decision on December 29, 1972 (People v. Cameron et al, 40 A D 2d 1034). With respect to two orders of this Court denying successive motions to suppress evidence, the cases were remanded to this Court for a

hearing and a new determination on defendants' motion to suppress evidence on the grounds that statements contained in the affidavit upon which the search warrants were issued were perjurious.

In question were three search warrants issued and executed on May 21, 1971, upon an affidavit executed by police officer Lucido Bonino which described certain activities of defendant Stanley Sims observed during three periods of surveillance and which alleged that a policy operation was being conducted. On defendants' motion to controvert the warrants and to suppress the evidence seized, the right to a hearing was waived and the motion was argued solely on the grounds of legal sufficiency of the underlying affidavit. The Appellate Division has upheld the finding of a

sufficient showing of probable cause to justify the issuance of the warrants.

A subsequent motion was made to suppress the seized evidence on the grounds that the affidavit contained perjured testimony and requesting a hearing on that issue. In support of such motion, defendants' counsel in his affirmation stated, upon information and belief, that as a result of testimony given before the Knapp Commission a Federal grand jury had been convened to inquire into the conduct of the arresting officer in this case, that the officer had refused to testify on the grounds of self-incrimination and that the affidavit upon which the warrants had been issued contained perjured testimony. In opposition, the People stated that the United States Attorney's office had informed them that

although the officers involved had been called before the Grand Jury, the testimony sought had nothing to do with their conduct in this case. The motion was denied in this Court by order dated January 25, 1972.

In its decision the Appellate Division stated:

"In our opinion, a hearing should have been granted upon defendants' allegations of perjury. A search warrant may be attacked on the grounds of perjury in the underlying affidavit (People v. Alfinito, 16 N Y 2d 181). Defendants' allegations with respect to the proceedings before the Knapp Commission and the subsequent grand jury proceedings were not conclusively refuted by the People. However tenuous the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired. We note that upon the hearing ordered herein the burden of proof will be on defendants and any fair doubt arising from the testimony at the hearing is to be resolved in favor of the warrant (People v. Alfinito, supra,

p. 186)."

Accordingly, a hearing was held on June 5th, 6th and 7th, 1973. Defendants called as their first witness the police officer who had made and executed the affidavit, Lucido Bonino, Shield No. 5714, a member of the New York Police Department for 10 years, active in plain clothes investigation of gambling activities for about three years. The officer was questioned concerning his activities and observations on May 18, 1971. He said that he knew defendant Stanley Sims from pictures, previous observation and that he had been pointed out by a fellow officer; that he had observed the said defendant go in a Plymouth car to premises 145-50 New York Boulevard, Jamaica, New York, the residence of defendants

Cameron. When asked whether he had been subpoenaed before a Federal grand jury to testify in this case the officer answered "No". (Minutes, p. 19) The following exchange ensued:

(By defendants' counsel)

"Q Did you appear before a federal grand jury in connection with your investigation and duties in connection with the Stanley Sims investigation?

A That's the federal grand jury you are asking now?

Q I said the federal grand jury.

A And this is with my investigation of Stanley Sims?

Q In other words, you work in connection with your, investigation of Stanley Sims, what preceded the arrest, the arrest and what followed the arrest.

THE WITNESS: Your Honor, I request to take the Fifth Amendment on this question."

Following a recess, the witness returned, accompanied by Leon Washor,

Esq., his own attorney. The Court read the question and answer (Minutes, p. 28) and asked:

"THE COURT: Did you want that question repeated?

MR. WASHOR: I will let counsel conduct his own examination.

MR. MOSLEY: I would object to the form of the question. It is three questions in one.

THE COURT: At this point then the objection is sustained and the answer is stricken.

Continue, Mr. Diller.

MR. DILLER: I didn't ask any questions.

THE COURT: He is objecting to the last question I just read.

MR. DILLER: There was no objection made at that time, and an objection would be untimely if made at the present time.

THE COURT: I will permit the objection and I will sustain the objection. The answer is stricken. If you wish to reframe the question you may. Let us continue."

After some colloquy, counsel for

defendants continued. (Minutes, p. 30).

"Q Were you subpoenaed to testify before a federal grand jury in connection with Stanley Sims?"

(Further colloquy)

"A I was subpoenaed before a federal grand jury. In reference to the Sims case, I would have to say no, not directly.

Q You say 'not directly.' Were there questions asked of you in that grand jury with respect to your investigation of the Sims case?

A I don't believe there were any questions asked regarding the Sims case. If there were, I did invoke my constitutional privileges."

Following testimony about the seizure of drugs and money the witness was asked:

"Q In the federal grand jury were you questioned with respect to the seizure of currency?

A I don't believe I was. If I was, I did invoke my constitutional privileges.

Q Now I ask you at this time, Officer Bonino, did you seize any money on May 21, 1971 that

was not reported to the Police Property Clerk?

MR. MOSLEY: I object.

THE COURT: Overruled. I will take it.

THE WITNESS: At this time, Your Honor, may I confer with my counsel?

THE COURT: Yes.

THE WITNESS: Your Honor, after conferring with my attorney, at this time I wish to invoke my constitutional privilege and not answer this question.

THE COURT: Next question.

Q Were there any drugs seized in connection with this investigation that were not turned into the Police Property Clerk?

MR. MOSLEY: I object, Your Honor.

THE COURT: Overruled.

THE WITNESS: May I confer with my counsel?

THE COURT: Yes.

(The witness then conferred in private with Mr. Washor.)

THE WITNESS: Your Honor, after conferring with my attorney,

at this time I wish to invoke my constitutional privilege and not answer this question.

THE COURT: Next question.

Q Were there any drugs seized in connection with this investigation that were not turned into the Police Property Clerk?

MR. MOSLEY: I object, your Honor.

THE COURT: Overruled.

THE WITNESS: May I confer with my counsel, your Honor?

THE COURT: Yes.

(The witness then conferred in private with Mr. Washor.)

"MR. DILLER: Will the record reflect that the witness had an opportunity and did in fact confer with counsel, your Honor.

THE COURT: Let the record so indicate.

THE WITNESS: Your Honor, after conferring with counsel, I again invoke my constitutional privileges and refuse to answer that question.

Q Officer Bonino, again directing your attention to May 21, 1971, was there jewelry seized from the Sims' home which you did not report

to the Police Property Clerk?

THE WITNESS: Again, your Honor, after conferring with my attorney, I invoke my constitutional rights and refuse to answer this question.

Q In connection with monies seized at the Sims' home on May 21, 1971, were you together with a brother officer at that time?

A Yes, I was.

Q And who was the brother officer?

A I believe it was Patrolman Henry, I believe it was.

Q And was he with you present when the money was taken from the house?

A Yes.

Q And was Patrolman Fratello present?

A At the Sims' residence?

Q Yes.

A No, he was not.

Q Was Patrolman Fratello with you at the Cameron residence?

A Yes, he was.

Q With respect to the Cameron residence, again on May 21, 1971, was there any money taken from that

"A"

house that were not reported to the Police Property Clerk?

THE WITNESS: Again, your Honor, after conferring wth counsel, I wish to invoke my constitutional privileges and not answer this question."

The witness was further questioned concerning the amount of drugs, cash and other items seized which he answered in detail.

Before discussing the testimony of three additional witnesses produced by the defendants, comment upon defendants' argument is deemed appropriate at this time. The People produced no witnesses.

Guidlines for determination of an attack upon police affidavits in support of application for warrants have been prescribed in People v. Alfinito, supra, cited by the Appellate Division, in remitting the instant case to this Court for hearing.

"A"

The thrust of defendants argument is that they have supported the burden, urging the theory that once a police officer availed himself of the privilege of exercising the Fifth Amendment, it became incumbent upon the People to refute the admission of perjury inherent therein. This conclusion implies an inherent admission of perjury with respect to any sworn statements at any time previously made by any person who exercises such constitutional privilege. This Court doubts that the men who wrote that privilege into the constitution intended that any person who availed himself of it thereby automatically conceded an admission of perjury. On the contrary, it would appear that by permitting a person to exercise such privilege, they were recognizing his right to protect himself without committing perjury.

However, careful examination of the questions propounded with respect to which the privilege was exercised is necessary to help determine whether the answers thereto, if given, might significantly aid the Court in determination of the truth or falsity of the affidavit made in support of the warrants. The only such question in which reference was made to the affidavit appears on page 41 of the Minutes as follows:

> "Q Were you questioned in the federal grand jury concerning the truthfulness of the affidavit that you submitted in order to procure a search warrant in this case.
>
> A As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges."

The witness was closely questioned at considerable length concerning the preparation of the affidavit, the

reasons for it, the observations of the witness, the facts and circumstances preceding the execution of it, to all of which the defendant testified freely without once asserting his constitutional rights. From the foregoing, it is obvious that the witness invoked his constitutional rights only when asked about police conduct in connection with the execution of the warrants and not with respect to affidavit preceding it.

Defendants further pointed out that the People saw fit not to call any of Officer Bonino's named partners, one of whom was present during the alleged observations and the other at the time of the arrest, citing People v. Harrington, 70 Misc 2d 303, in which a defendant had accused a named police officer of coercing his confession. In that case the Court granted suppression

"A"

of the admissions after finding that the defendant had been held in custody without counsel for a week between two interrogations but denied the motion to suppress the use of the gun in evidence, holding further that the owner of the gun was not involved in the allegations of the crime and was available equally to the People and to the defendant, and that in such respect the defendant had failed to meet his burden of proof. As pointed out by the Court with respect to confessions, the burden is on the People to show their admissibility beyond a reasonable doubt (People v. Huntley, 15 N Y 2d 72), whereas in the instant situation the burden is on the defendants. It was the defendants not the People who produced Officer Bonino as a witness. The other officers were known and available equally to both. A further

distinction is that in the instant case there was no uncontradicted evidence to refute. The failure of the People to produce such other witnesses cannot be viewed in the light that their version would controvert any proof previously offered as in the cited case.

Defendants' contention that the witness was evasive and in fact refusing to testify is untenable. An examination of the testimony shows direct answers to all questions relating to observations and activities of the officers and defendants leading up to and including the preparation of the affidavit in the instant case. True, the witness refreshed his recollection from the affidavit but the Court cannot construe that as evasion or reluctance to answer questions. The defendants' counsel is endeavoring to have such testimony tainted by the witness'

exercise of his constitutional rights with respect to questions concerning his conduct during or after the execution of the warrants is understandable but this Court cannot agree with the principle thus sought to be established, to wit, that unlawful conduct other than perjury of an individual, whether or not he be a police officer, if proven to have been committed subsequent to the execution of an affidavit, establishes perjury in the affidavit.

As counsel states, it is indeed a bizarre spectacle for a police officer appearing in Court to be exercising his constitutional rights in response to questions concerning his activities while engaged in the performance of his official duties. Such conduct, both with respect to the proceedings before the Knapp Commission and in this Court, lend support to the

specter of police corruption requiring full airing of the facts in an effort to determine whether or not there was perjury in the affidavit admitted in support of the warrants.

Defendants produced three additional witnesses. The first, Henry Schnitzer, an attorney of long standing, who had been a member of the police force and had worked in the Police Commissioner's Confidential Squad, conceded to be an expert in policy cases, testifying in substance that nobody places policy bets after the third race and that no special type envelopes are used in the policy business. (Minutes, pp.74-76.) Counsel's argument and conclusions are that no policy banker would take a bet after 2 P.M., as bearing upon Officer Bonino's testimony that he had observed envelopes being handed to defendant Sims after 2 P.M. on May 19, 1971

(p.66). The Court finds the testimony of this witness and the aforesaid argument not persuasive.

The remaining two witnesses were defendants Edith Cameron and Juanita Sims. Mrs. Cameron testified on direct examination that defendant Stanley Sims was the only person who entered her home between 11:30 A.M. and 2:30 P.M. on May 18, 1971 (Minutes, p. 78), that he remained until the evening (p.79), that from the time he entered until the evening, the rest of the defendants came in (pp.79-80). While still on direct examination she testified as follows:

"Q Now, directing your attention to the 19th, the following day, did you hear Patrolman Bonino testify that approximately five or six men came to your home during that period of time?

A Yes.

Q And did anyone come to to your home on the 19th?

"A"

A Yes, they did.

Q Who came?

A Mr. Williams and Mr. Davis.

Q Did anyone ring the bell during that period of time other than those persons?

A No.

Q Who answers the door in your house?

MR. LEARY: Objection.

A I do.

THE COURT: Overruled. I will take it.

Q And did Oscar Thomas stay at any time in your home on the 19th of May?

A No."

The equivocal response to the second question was not further explored but in any event her testimony, unsupported by more credible evidence, cannot be accepted at face value in the light of her obvious interest in the outcome of her plea of guilty in this very case to criminal possession

of gambling records, second degree.

Witness, Juanita Sims, also a defendant who pleaded guilty to the same crime, denied that any people knocked on her door on May 18, 1971 before 2:55 and 3:30 in the afternoon and that anybody came to her house on May 19th (p.82). She further testified on direct examination that her husband was "probably" home and that she usually answers the door herself. The Court was unimpressed with her testimony.

There remains now the weighing of the evidence produced by defendants to determine whether or not it was sufficient to cast doubt upon the truth of the affidavit submitted in support of the warrants. Though it is no doubt true that in the normal course of our everyday experience the automatic reaction to the assertions of the

constitutional right of refusal to answer is the mental question: "I wonder what he had to hide?"--it does not simultaneously brand the witness as a perjuror or as a person who has committed any crime. Nevertheless, as the Appellate Division pointed out in that portion of its opinion previously quoted: "However tenuous the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired."

This Court cannot agree with defendants' basic argument, to the effect that a police officer having asserted his said constitutional rights with respect to conduct involved in the execution of the warrants, all of which were subsequent to the execution of the challenged affidavit thereby impugns the truth of the contents

of the affidavit. Even assuming, arguendo, that proof had been adduced of criminal acts of the police officer during or subsequent to the making of the affidavit, the conclusion that the affidavit was perjurious would be without foundation. Carrying the assumption to a step further, the Court cannot assume or conclude that because a police officer asserts his constitutional rights to avoid a forced disclosure of his possible participation in criminal conduct that he was necessarily guilty of perjury in the execution of the said affidavit. The Court's previous comment with respect to the limits of the area in which the police officer witness availed himself of the privilege, and the fact that he testified freely with respect to his conduct prior to and in connection with the execution of the affidavit, are

here pertinent.

The Court finds that the proof offered by the defendants falls far short of the standards prescribed in People v. Alfinito, supra, by which even a fair doubt arising from the testimony would have to be resolved in favor of the warrant. The Court holds that no doubt has been cast upon the truth of the contents of the affidavit submitted in support of the warrants. The defendants have failed to sustain the burden of proof. The findings of this Court are as set forth in the foregoing.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and the order entered thereon to the attorney for the defendants.

....WILLIAM.C..BRENNAN....
J. S. C.

here pertinent.

The Court finds that the proof offered by the defendants fails far short of the standard prescribed in People v. Aitimiro, supra, by which even a fair doubt existing from the testimony would have to be resolved in favor of the warrant. The Court holds that no doubt has been cast upon the truth of the recitals of the affidavit subscribed in support of the warrant. The defendants have failed to sustain the burden of proof. The findings of this Court are as set forth in the foregoing.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this decision and the order entered thereon to the attorney for the defendants.

...WILLIAM C. BROWN...
J. S. C.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. EDITH M. CAMERON, STANLEY T. SIMS, KENNETH DAVIS, ROBERT S. WILLIAMS, MARVIN CAMERON, and JENNIE SIMS, Appellants.-- Appeal from six judgments of the Supreme Court, Queens County, all rendered May 15, 1972 (one as to each defendant), convicting them of criminal possession of a dangerous drug (in varying degrees) etc., upon guilty pleas and imposing sentences. The appeal brings up for review two orders of the same court, dated November 30, 1971 and January 25, 1972, which, respectively, denied their two successive motions to suppress evidence. Cases of the six defendants remitted to the Criminal Term for a hearing and a new determination on defendants' motion to suppress evidence on the ground that statements contained in the affidavit

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent, v. EDITH M. CAMERON, STANLEY T. SIMS, KENNETH DAVIS, ROBERT S. WILLIAMS, MARVIN CAMERON, and JENNIE SIMS,

Appellants.-- Appeal from six judgments of the Supreme Court, Queens County, all rendered May 16, 1972 (one as to each defendant), convicting them of criminal possession of a dangerous drug (in varying degrees) etc., upon guilty pleas and imposing sentences. The appeal brings up for review two orders of the same court, dated November 30, 1971 and January 25, 1972, which, respectively, denied their two successive motions to suppress evidence. Cases of the six defendants remitted to the Criminal Term for a hearing and a new determination on defendants' motion to suppress evidence on the ground that statements contained in the affidavits

APPENDIX "B"

upon which the search warrants were issued were perjurious. In the interim, the appeals will be held in abeyance. On May 21, 1971 three search warrants were issued and executed upon an affidavit by a police officer which described certain activities of defendant Stanley Sims observed during three periods of surveillance and which alleged that a policy operation was being conducted. Defendants moved to controvert the warrants and to suppress the evidence seized. The right to a hearing was waived and the motion was argued solely on the ground of the legal sufficiency of the underlying affidavit. The motion was denied by order of November 30, 1971. In our opinion, the Criminal Term properly found that the statements contained in the affidavit made a sufficient showing of probable cause to justify the issuance of the

upon which the search warrants were issued were destructive. In the interim, the appeals will be held in abeyance.

On May 21, 1971 three search warrants were issued and executed upon an affidavit by a police officer which described certain activities of defendant Stanley Sims observed during three periods of surveillance and which alleged that a policy operation was being conducted. Defendants moved to controvert the warrants and to suppress the evidence seized. The right to a hearing was waived and the motion was argued solely on the ground of the legal sufficiency of the underlying affidavit. The motion was denied by order of November 30, 1971. In our opinion, the criminal Term properly found that the statements contained in the affidavit made a sufficient showing of probable cause to justify the issuance of the

warrant (People v. Smith, 21 NY 2d 698; People v. Valentine, 17 NY 2d 128; People v. Meyers, 38 A.D. 2d 484; People v. White, 16 NY 2d 270; United States v. Ventresca, 380 US 102, 108-112). Defendants subsequently moved to suppress the evidence seized on the ground that the affidavit contained perjured testimony and requested a hearing on that issue. The motion was supported by an affirmation by defense counsel stating, upon information and belief, that as a result of testimony given before the Knapp Commission a Federal Grand Jury had been convened to inquire into the conduct of the arresting officers in this case; that the officers had refused to testify on the ground of self-incrimination; and that the affidavit upon which the warrant had been issued contained perjured testimony. In opposition, the People stated

that the United States Attorney's office had informed them that although officers involved in this case had been called before a Grand Jury, the testimony sought had nothing to do with their conduct in this case. The motion was denied by order of January 25, 1972. In our opinion, a hearing should have been granted upon defendants' allegations of perjury. A search warrant may be attacked on the ground of perjury in the underlying affidavit (People v. Alfinito, 16 NY 2d 181). Defendants' allegations with respect to the proceedings before the Knapp Commission and the subsequent Grand Jury proceedings were not conclusively refuted by the People. However tenuous the grounds in support thereof, the specter of police corruption was raised and justice required a hearing at which the facts could be fully aired. We note that upon the hearing

ordered herein the burden of proof will be on defendants and any fair doubt arising from the testimony at the hearing is to be resolved in favor of the warrant (People v. Alfinito, supra, p.186). Shapiro, Acting P.J., Gulotta, Christ, Brennan, and Benjamin, JJ., concur.

"B"

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 29, 1972

HON. J. IRWIN SHAPIRO, Acting Presiding Justice

HON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST — Associate
HON. ARTHUR D. BRENNAN — Justices
HON. A. DAVID BENJAMIN

- - - - - - - - - - - - - - - - x

The People, etc.,

Respondent,

v. : Order on appeals from judgments

Edith May Cameron, Stanley Taylor Sims, Kenneth Davis, Robert Stewart Williams, Marvin Cameron and Jennie Sims,

Appellants.

- - - - - - - - - - - - - - - - x

In the above entitled cause, the above named Edith May Cameron, Stanley Taylor Sims, Kenneth Davis, Robert Stewart Williams, Marvin Cameron and Jennie Sims,

defendants, having appealed to this court from six judgments of the Supreme Court, Queens County, all rendered May 15, 1972 (one as to each defendant), convicting them of criminal possession of a dangerous drug (in varying degrees) etc., upon guilty pleas, and imposing sentences; and upon said appeals, this court having reviewed two orders of the same court, dated November 30, 1971 and January 25, 1972, which, respectively, denied their two successive motions to suppress evidence; the appeals having been submitted by Howard J. Diller, Esq., of counsel for appellants and by Cornelius J. O'Brien, Esq., of counsel for respondent; due deliberation having been had thereon; and upon this court's opinion slip heretofore filed and made part hereof; it is unanimously:

ORDERED that the cases of the six defendants are hereby remitted to the

Criminal Term for a hearing and a new determination on defendants' motion to suppress evidence on the ground that statements contained in the affidavit upon which the search warrants were issued were perjurious; and it is further

ORDERED that in the interim, the appeals will be held in abeyance.

Enter:

/s/ Irving N. Selkin

Clerk of the Appellate Division

"B"

SUPREME COURT: APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT.

- - - - - - - - - - - - - - - - - - - - - - - -

GULOTTA, P.J., SHAPIRO, CHRIST, BRENNAN and BENJAMIN, JJ.

- - - - - - - - - - - - - - - - - - - - - - - -

THE PEOPLE, etc.,

Respondent,

v.

EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STEWART WILLIAMS, MARVIN CAMERON, JENNIE SIMS,

Appellants.

- - - - - - - - - - - - - - - - - - - - - - - -

Appeals from six judgments of the Supreme Court, at Criminal Term in Queens County, all rendered May 15, 1972 (one as to each defendant), convicting them of criminal possession of a dangerous drug (in varying degrees) and other crimes, upon guilty pleas, and imposing sentences (WILLIAM C. BRENNAN, J.). The appeal

brings up for review three orders of the same court, two of which denied their two successive motions to suppress evidence, prior to the guilty pleas (dated November 30, 1971 [FRANK D. O'CONNOR, J.] and January 26, 1972 [WILLIAM C. BRENNAN, J.]), and the third again denied said motion, after rendition of the judgments and after a hearing held pursuant to a remand during the pendency of the appeals (dated August 14, 1973 [WILLIAM C. BRENNAN, J.]).

Diller & Schmukler (Joel A. Brenner of counsel), for Appellants.

Nicholas Ferraro, District Attorney of Queens County (Charles M. Newell of counsel), for respondent.

S H A P I R O, J. The question here is whether evidence seized pursuant to a search warrant should be suppressed because the police officer upon whose affidavit the warrant issued refused, on constitutional grounds, to answer questions

at the suppression hearing with regard to his conduct following the seizure (including what he had done with the seized items). The appeals are from six respective judgments convicting the six defendants of various crimes, upon guilty pleas, and the appeals bring up for review three orders denying motions by the defendants to suppress evidence. One of the orders was made after a hearing held pursuant to a remand during the pendency of the appeals, as appears below.

When these appeals were originally before us we held that the statements contained in the police officer's affidavit made a sufficient showing of probable cause to support the issuance of the warrant, but we remanded the case to the Criminal Term solely to determine, after a hearing, whether those statements were perjurious (People v. Cameron, 40 A.D. 2d

1034). The remand was predicated on the allegations of the defense that the affidavit contained perjurious statements and that the officer had refused to testify before a Federal Grand Jury inquiring into his official conduct on the ground that his testimony might incriminate him. Noting that a search warrant may be set aside if the affidavit upon which it was issued is shown to be perjurious, we held the appeals from the judgments of conviction in abeyance pending the hearing ordered to determine that issue. That hearing has now been had and Mr. Justice BRENNAN has determined that the defendants did not sustain the burden which the law places upon them of demonstrating the perjurious nature of the affidavit.

The issue presented is a troublesome one, since the police officer whose veracity is at issue did refuse, on

constitutional grounds, to answer questions before Mr. Justice BRENNAN with regard to the execution of the warrant or his disposition of the items seized.

No one can hold a brief for a police officer who, in a judicial inquiry, refuses to answer questions about the performance of his duties on the ground that his answers might be incriminating. However, as Mr. Justice BRENNAN pointed out, all of the police officer's refusals to answer dealt with occurrences which took place after the seizure under the warrant; none of them dealt with the truthfulness of the affidavit upon which the warrant was obtained. The record is crystal clear that he was examined in great detail about the contents of his affidavit and answered every question asked him with respect to that.

The police officer at the hearing

before Mr. Justice BRENNAN denied he had been questioned before the Federal Grand Jury about the truthfulness of his affidavit in this case, but he then volunteered the information that if he had been so questioned he would have invoked his constitutional privileges. Mr. Justice BRENNAN thereupon, in effect, suggested that the officer be directly asked whether his affidavit was truthful. That suggestion was not accepted. If that had been done and if the officer had then invoked his constitutional privilege against incrimination, we would be presented with a different picture. Here, however, we have a situation in which the ultimate burden of proof to establish perjury was upon the moving defendants (People v. Alfinito, 16 N Y 2d 181, 186) and I cannot quarrel with the court's findings that they failed to sustain that burden, particularly as

another police officer was present at the time the observations underlying the affidavit were made and was not called as a witness, despite the court's pointed suggestion that this be done.

Accordingly, the judgments of conviction and the three orders should be affirmed.

GULOTTA, P.J., CHRIST, BRENNAN, and BENJAMIN, JJ., concur.

"B"

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 6, 1974.

HON. FRANK GULOTTA, Presiding Justice
HON. J. IRWIN SHAPIRO
HON. MARCUS G. CHRIST — Associate
HON. ARTHUR D. BRENNAN — Justices
HON. A. DAVID BENJAMIN

- - - - - - - - - - - - - - - - x

The People of the State of New York, :

Respondent, :

v. : ORDER

Edith May Cameron, Stanley Taylor Sims, Kenneth Davis, Robert Stewart Williams, Marvin Cameron and Jennie Sims, :

Appellants. :

- - - - - - - - - - - - - - - - x

In the above entitled cause, the above named Edith May Cameron, Stanley Taylor Sims, Kenneth Davis, Robert Stewart Williams, Marvin Cameron and Jennie Sims,

defendants, having appealed to this court from six judgments of the Supreme Court, Queens County, all rendered May 15, 1972 (one as to each defendant), convicting them of criminal possession of a dangerous drug (in varying degrees) etc., upon guilty pleas, and imposing sentences; and upon said appeals, this court having reviewed two orders of the same court, dated November 30, 1971 and January 26, 1972, which respectively, denied their two successive motions to suppress evidence; the appeals having been submitted by Howard J. Diller, Esq., of counsel for appellants and by Cornelius J. O'Brien, Esq., of counsel for respondent; this court, by order dated December 29, 1972, having (1) remitted the cases of the six defendants to the Criminal Term for a hearing and a new determination on defendants' motion to suppress evidence on the ground that statements contained in

the affidavit upon which the search warrants were issued were perjurious and (2) ordered the appeals held in abeyance; and said Criminal Term, by order dated August 14, 1973, after a hearing held pursuant to said remand, having denied said motions; and the said appeals, on February 6, 1974, having been argued by Joel A. Brenner, Esq., of counsel for the appellants, and argued by Charles M. Newell, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the six judgments, all rendered May 15, 1972 (one as to each defendant), and the three orders, dated November 30, 1971, January 26, 1972 and August 14, 1973, respectively, are hereby unanimously affirmed, and it is further

ORDERED that the case is hereby

remitted to the Criminal Term for proceedings to direct appellants to surrender themselves to said court in order that execution of the judgments be commenced or resumed (CPL 450.60, subd. 5).

OPINION by SHAPIRO, J.

GULOTTA, P.J., CHRIST, BRENNAN and BENJAMIN, JJ., concur.

Enter:

/s/ Irving N. Selkin

Clerk of the Appellate Division

"C"

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. SOL WACHTLER
Associate Judge

---

THE PEOPLE OF THE STATE OF NEW YORK

against

EDITH MAY CAMERON

CERTIFICATE DENYING LEAVE

---

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein*, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

APPENDIX "C"

Dated at Mineola, New York
May 29, 1973

/s/ SOL WACHTLER
Associate Judge

*Description of Order: Judgment of Supreme Court, Queens County, dated May 15, 1972, affirmed by Appellate Division, Second Department, May 6, 1974.

CRIMINAL COURT OF THE CITY OF NEW YORK

Part One A, County of Queens

State of New York )
County of Queens ) ss.:

Patrolman Lucido Bonino,
Shield 7541, 16th Division

- - - - - - - - - - - - - - - - - - - - - - -

being duly sworn, deposes and says:

1. I am a Police Officer assigned to Plainclothes Duty in the 16th Division New York City Police Department.

2. I have information based upon the following: Based on my knowledge and experience as a plainclothes officer assigned to gambling investigations, I made the following investigation and observations: On Tuesday, May 18, 1971, at about 1110 hours, while on patrol and in the area of my assigned Location Prone to Public Morals Violations, I did observe said Stanley Sims, A Known Gambler, known to me to be involved in illegal Policy operations, leave his residence 197-01 116th Avenue, St. Albans, New York, and enter a 1970 Plymouth, license PZ6368(NY). Seated behind the wheel of the Plymouth was an unknown Male Negro. After Stanley Sims entered, the driver pulled out from the curb and drove said vehicle towards Jamaica, New York. I followed said vehicle to 145-40 New York Boulevard, Jamaica, New York. Unknown Male Negro parked said vehicle in front of 145-40 New York Boule-

vard and both he and Stanley Sims departed from said vehicle and entered said premises. I kept 145-40 New York Boulevard under observation from approximately 1130 hours to 1430 hours. During this period of time approximately six unknown male negroes entered premises and remained therein. At approximately 1430 hours, Stanley Sims and the unknown male driver of above vehicle departed from premises, proceeded to vehicle entered same and they drove away. I followed said vehicle to Stanley Sims' residence. Driver of vehicle parked said vehicle and both he and Sims got out of vehicle and entered Sims' residence. I observed that Sims was carrying a large paper bag when he departed from the premises 145-40 New York Blvd., and when he entered his residence, he was carrying the same paper bag. I kept Sims' residence under observation from 1455 to 1530 hours, and during this period of time, I observed numerous unknown males approach premises, knock on the front door and door was answered by Stanley Sims. After a short conversation with Sims, each of these unknown Males handed him brown envelopes (envelopes of the kind which are used by policy collectors), and departed from the area.
On Wednesday, May 19, 1971, at 1115 hours, I went to Stanly Sims residence walked to the curb where the above 1970 Plymouth, PZ6368(NY) was parked.
The same unknown Male Negro was seated behind the wheel of said vehicle,

[Page 2]

Sims entered said vehicle and both he and the unknown Male negro drove towards Jamaica. I kept said unknown Male and Stanley Sims under observation from 1125 to

1545 hours on this date and they both repeated the operation of the first day to the letter.
On Thursday, May 20, 1971, at 1130 hours, I again went to Stanley Sims residence and at approximately 1145 hours, Stanley Sims departed from his residence, walked to the curb where the same 1970 Plymouth was parked, with the same unknown Male Negro seated behind the wheel of said vehicle. Again Sims entered vehicle and both he and the unknown Male drove towards Jamaica, New York. I kept said unknown Male and Stanley Sims under observation from 1145 to 1500 hours and again they repeated the operation of the first day to the letter. A check with the Motor Vehicle Bureau, discloses that said vehicle is registered to Oscar Thomas at 18-27 201st Street, Queens, New York and calls for a 1970 Green Plymouth, License PZ6368. Stanley Sims is known to the New York City Police Department under Known Gambler Serial Number 4993, B224458 and has a record of 15 arrests for Policy Violations most of which are for Controller of a Policy Operation. In my opinion as an expert qualified by the Courts on Policy, my investigation and observations lead me to believe that the above described Stanley Sims and the "John Doe" Male Negro (driver of 1970 Plymouth), are receiving and accepting wagers on Policy inside the aforementioned Premises.

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property Namely: written records of wagers on Mutual Race Horse Policy numbers and other paraphernalia commonly used in

illegal Policy, are possessed and/or concealed in violation of 225.05 of the Penal Law, and may be found in the possession of Stanley Sims and or "John Doe" (Male, Negro) driver of 1970 Plymouth, or at premises 197-01 116th Avenue, 145-40 New York Boulevard and/or 1970 Green Plymouth, License PZ6368(NY).

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of persons, premises and vehicle above, and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

Lucido Bonino, Shield 7514, Ptl., 16th Div.
Police Officer Shield Rank Command

Sworn to before me

May 21, 1971, 19

Judge

"Q"

"D"

Search Warrant #308
Sec. 797 C.C.P.

Criminal Court of the
City of New York

Part One A, County of Queens

In the name of the People of the State of New York:

To any peace officer in the City of New York.

Proof by affidavit (or deposition) having been made this day before me by Patrolman Lucido Bonino, Shield 7514, 16th Division. that there is probable cause for believing that certain property is possessed and/or concealed in violation of 225.05 of the Penal Law.

You are therefore commanded, between 6:00 A.M. and 9:00 P.M. to make an immediate search of 1970 Plymouth, Green, License PZ6368 NY occupied by "John Doe" Male Negro and Stanley Sims and of the person of "John Doe Male Negro and Stanley Sims and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for namely: written records of wagers on Mutual Race Horse Policy numbers and other paraphernalia, commonly used in illegal Policy. and if you find any such property or any part thereof to bring it before me at Part One A at 125-01 Queens Boulevard, Kew Gardens, N.Y.C.

Dated at New York City,

May 21, 19 71

Judge

"D"

"D"

Search Warrant #308
Sec. 797 C.C.P.

Criminal Court of the
City of New York

Part One A, County of Queens

In the name of the People of the State of New York:

To any peace officer in the City of New York.

Proof by affidavit (or deposition) having been made this day before me by Patrolman Lucido Bonino, Shield 7514, 16th Division that there is probable cause for believing that certain property is possessed and/or concealed in violation of 225.05 of the Penal Law.

You are therefore commanded, between 6:00 A.M. and 9:00 P.M. to make an immediate search of 197-01 116th Avenue, St. Albans, New York occupied by Stanley Sims and of the person of Stanley Sims and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered for namely: written records of wagers on Mutual Race Horse Policy numbers and other paraphernalia commonly used in illegal Policy. and if you find any such property or any part thereof to bring it before me at Part One A at 125-01 Queens Blvd., Kew Gardens, N.Y.C.

Dated at New York City,

May 21, 19 71

Judge

"D"

Search Warrant #308
Sec. 797 C.C.P.

Criminal Court of the
City of New York

Part One A, County of Queens

In the name of the People of the State of New York:

To any peace officer in the City of New York.

Proof by affidavit (or deposition) having been made this day before me by Patrolman Lucido Bonino, Shield 7514, 16th Division. that there is probable cause for believing that certain property is possessed and/or concealed in violation of 225.05 of the Penal Law.

You are therefore commanded, between 6:00 A.M. and 9:00 P.M. to make an immediate search of 145-40 New York Boulevard, Jamaica, New York occupied by Stanley Sims and of the person of Stanley Sims and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for namely: written records of wagers on Mutual Race Horse Policy numbers and other paraphernalia commonly used in illegal Policy and if you find any such property or any part thereof to bring it before me at Part One A at 125-01 Queens Blvd., Kew Gardens, New York City.

Dated at New York City,

May 21, 19 71

Judge

NOV 18 [illegible]
[illegible]EL RODAK, JR.

IN THE

# Supreme Court of the United States

October Term, 1974

**No. 74-317**

EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STUART WILLIAMS, MARVIN CAMERON, JENNIE SIMS,

*Petitioners,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department**

## BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

NICHOLAS FERRARO
*District Attorney*
Queens County
*Attorney for Respondent*
125-01 Queens Boulevard
Kew Gardens, N. Y. 11415
(212) 520-2092

CORNELIUS J. O'BRIEN
CHARLES M. NEWELL
Assistant District Attorneys
*Of Counsel*

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| Introduction | 1 |
| Opinions Below | 3 |
| Jurisdiction | 3 |
| Questions Presented | 4 |
| Statutes Involved | 4 |
| Statement of Facts | 4 |
| Argument | |
| Point One—No question concerning the constitutional right to confront witnesses is properly before this Court | 11 |
| Point Two—The case presents no substantial federal question requiring resolution by this Court | 13 |
| Point Three—The finding of probable cause for the issuance of the search warrant is in accord with prior decisions of this Court | 16 |
| Conclusion | 17 |

## TABLE OF AUTHORITIES

PAGE

*Cases:*

Aguilar v. Texas, 378 U.S. 108 (1964) ..... 16, 17

Beck v. Washington, 369 U.S. 541 (1962) ..... 12

Coil v. United States, 343 F. 2d 573 (8th Circuit, 1966), *cert. denied* 382 U.S. 821 ..... 15
Counselman v. Hitchcock, 142 U.S. 547 (1892) ..... 13

Fountain v. United States, 384 F. 2d 124 (5th Circuit, 1968), *cert. denied sub nom.* Marshall v. United States, 390 U.S. 1005 ..... 14, 15

Garrity v. New Jersey, 385 U.S. 493 (1967) ..... 13

Hoffman v. United States, 341 U.S. 479 (1951) ..... 13

In re Gault, 387 U.S. 1 (1967) ..... 13

Jones v. United States, 362 U.S. 257 (1960) ..... 16

Malloy v. Hogan, 378 U.S. 1 (1964) ..... 13
Michael v. Louisiana, 350 U.S. 91 (1955) ..... 12
Miranda v. Arizona, 384 U.S. 436 (1966) ..... 13

Namet v. United States, 373 U.S. 179 (1963) ..... 14
New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928) ..... 12

Parker v. Illinois, 333 U.S. 571 (1948) ..... 12
People v. Alfinito, 16 N.Y. 2d 181 (1965) ..... 8
Pointer v. Texas, 380 U.S. 440 (1965) ..... 14

Quinn v. United States, 349 U.S. 155 (1955) ..... 13

PAGE

Spevak v. Klein, 385 U.S. 511 (1967) ..... 13
Spinelli v. United States, 393 U.S. 410 (1969) .....16, 17
State v. McKuin, 434 F. 2d 391 (8th Circuit, 1970), *cert. denied* 401 U.S. 911 ..... 15
Street v. New York, 394 U.S. 576 (1969) .....12, 13

Ullman v. United States, 350 U.S. 422, rehearing denied 351 U.S. 928 (1956) ..... 13
Ungar v. Sarafite, 376 U.S. 575 (1964) .....12, 13
United States v. Aiken, 373 F. 2d 294 (2d Circuit, 1967), *cert. denied* 389 U.S. 833 ..... 15
United States v. Brickley, 426 F. 2d 680 (8th Circuit, 1970), *cert. denied* 400 U.S. 826 ..... 15
United States v. Cardillo, 316 F. 2d 606 (2d Circuit, 1963), *cert. denied* 375 U.S. 882 .....14, 15
United States v. Collier, 362 F. 2d 135 (7th Circuit 1966), *cert. denied* 385 U.S. 977 ..... 15
United States v. Norman, 402 F. 2d 73 (9th Circuit, 1968), *cert. denied* 397 U.S. 938 ..... 15
United States v. Ventresca, 380 U.S. 102 (1965) .....16, 17

IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-317

EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STUART WILLIAMS, MARVIN CAMERON, JENNIE SIMS,

*Petitioners,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department**

## BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

### Introduction

This is a brief in behalf of respondent in opposition to a petition for a writ of *certiorari* to an intermediate appellate court of the State of New York, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

On May 15, 1972, the petitioners, Robert Williams and Marvin Cameron, were convicted of criminal possession of a dangerous drug in the second degree and sentenced to an indeterminate term of imprisonment not to exceed fifteen years; Stanley Taylor Sims and Kenneth Davis were convicted of criminal possession of a dangerous drug in the third degree and sentenced to indeterminate terms of imprisonment not to exceed fifteen years and twelve years, respectively; and Jennie Sims and Edith May Cameron were convicted of criminal possession of a dangerous drug in the sixth degree and sentenced to a fine of $1,000.00 and a period of probation not to exceed three years.

Petitioners all pleaded guilty before Mr. Justice William C. Brennan in Supreme Court, Criminal Term, Queens County, on February 17, 1972.

In an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated December 29, 1972, that court affirmed the order of the trial court, dated November 30, 1971, which denied a motion to suppress physical evidence on the ground that no probable cause existed for the issuance of a search warrant. However, the order of the trial court dated January 25, 1972, which denied without a hearing a motion to suppress the evidence on the ground that the affidavit upon which the search warrant was based was perjurious, was reversed and the appeal held in abeyance pending a determination of this issue at a hearing by the trial court.

Following a hearing by the trial court, the motion to suppress the evidence on the basis of perjury contained in the affidavit was denied in an order dated August 14, 1973

and the judgment of conviction was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Department, in an order dated May 6, 1974.

## Opinions Below

The first judgment of the Supreme Court of the State of New York, Appellate Division, Second Department, was rendered in an opinion officially reported at 44 A.D. 2d 355 (1974). The second judgment of that court was rendered in an opinion officially reported at 44 A.D. 2d 355 (1974).

On May 29, 1973, Judge Sol Wachtler, Associate Judge of the Court of Appeals of the State of New York, denied the petitioners' request for leave to appeal to the Court of Appeals. Judge Wachtler's certificate denying leave to appeal is not officially reported.

## Jurisdiction

The orders of the Supreme Court of the State of New York, Appellate Division, Second Department, were entered on or about December 29, 1972 and May 6, 1974, respectively, the dates the decisions were rendered. An extension of time within which to file this brief in response to the petition for a writ of certiorari was granted by this Court, and the time has been extended to and including November 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

## Questions Presented

1. Whether issues involving the constitutional right of an accused to confront witnesses against him, which were not presented to the state courts, can be raised for the first time in this Court?

2. Whether an accused is deprived of his constitutional right to confront witnesses against him where such a witness invokes his privileges against self-incrimination with regard to a collateral issue in the case?

3. Whether the personal observations of an affiant police officer revealing a pattern of highly unusual behavior furnish probable cause for the issuance of a search warrant?

## Statutes Involved

**United States Constitution:**

Fourth, Fifth and Fourteenth Amendments.

## Statement of Facts

Petitioners were indicted on June 8, 1971 under Indictment Numbers 2115/71 and 2116/71. Edith May Cameron and Marvin Cameron were indicted for the crimes of criminal possession of dangerous drugs in the first degree (Penal Law §220.23), promoting gambling in the first degree (Penal Law §225.10), possession of gambling records in the first degree (Penal Law §225.20) and possession of a dangerous weapon as a misdemeanor (Penal Law §265.05).

Stanley Taylor Sims, Robert Williams and Kenneth Davis were indicted for the crimes of criminal possession of dangerous drugs in the first degree (Penal Law §220.23), promoting gambling in the first degree (Penal Law §225.10) and possession of gambling records in the first degree (Penal Law §225.20). Jennie Sims was indicted for the crimes of promoting gambling in the first degree (Penal Law §225.10), possession of gambling records in the first degree (Penal Law §225.20) and possession of a dangerous weapon as a misdemeanor (Penal Law §265.05).

Prior to the entering of guilty pleas by all the petitioners, a motion was made to controvert the search warrant and suppress the evidence obtained thereby. Since all petitioners waived a hearing on the motion to suppress and elected to contest the legality of the search on the law only, the only facts in this case are those which appear in the affidavit of Patrolman Lucido Bonino in support of his application for the search warrant. This affidavit, which was sworn to May 21, 1971, before Judge Nicholas Tsoucalas, appears in section "D" of petitioners' appendix. From it, the following facts may be gleaned:

On Tuesday, May 18, 1971, at about 11:10 a.m., Patrolman Lucido Bonino, a plainclothesman assigned to gambling investigations, saw one Stanley Sims, a man listed in Police Department records as "Known Gambler No. 4993," leave his residence in St. Albans, Queens, and enter an automobile. Seated behind the wheel of the automobile was a male Negro whom Bonino did not know.

Patrolman Bonino knew Sims to be a man "involved in illegal policy operations." His affidavit in support of the

search warrant discloses that, in the records of the New York City Police Department, Sims is listed as having been arrested 15 times for "Policy Violations, most of which are for Controller of Policy Operations."

Sims and the unknown man drove to 145-40 New York Boulevard, Jamaica, New York, and entered that premises. Patrolman Bonino remained outside and kept the premises under observation for 5 hours. He saw "approximately" six unknown male Negroes enter and remain inside. At 4:30 p.m., Sims, who was carrying a large paper bag, and the driver of the automobile left 145-40 New York Boulevard and drove back to Sims' residence in St. Albans. Both Sims and his companion entered Sims' home, with Sims still carrying the paper bag.

Bonino kept Sims' home under surveillance for 35 minutes and saw "numerous unknown males" knock on the front door and carry on short conversations with Sims. Each man handed Sims brown envelopes and departed. The brown envelopes, according to Patrolman Bonino, were of a kind which are used by "policy collectors."

The next day, at approximately the same time in the morning, Patrolman Bonino again went to the Sims' residence. He observed Sims and the driver of the vehicle again leave and drive to the same place in Jamaica. While Bonino watched for six and one-half hours, he saw the same type of transactions repeated that he had observed the previous day.

On the following day, Thursday, May 20, 1971, Bonino kept Sims, his residence and the Jamaica premises under

observation for over five hours, and again observed the same type of transactions take place.

Bonino concluded that Sims and the driver of the automobile were receiving and accepting policy wagers. On May 21, 1971, he applied for and received a search warrant authorizing him to search Sims' home, the Jamaica address, and a 1970 Plymouth automobile, for gambling paraphernalia.

Pursuant to a search warrant issued by Judge Tsoucalas, a large quantity of policy slips was seized at 145-40 New York Boulevard. In addition, the police found 20 lbs. of pure heroin and two loaded revolvers.

The search of Sims' residence resulted in seizure of additional gambling records, two more revolvers, over $40,000 in cash and diamonds and other jewelry valued at about $15,000. A subsequent search of Sims' bank safe deposit box resulted in the seizure of approximately $70,000 additional cash and some U.S. Savings Bonds.

This motion to controvert the warrant and to suppress the evidence seized thereby was denied without a hearing on November 30, 1971, in an opinion by Hon. Frank D. O'Connor. A second motion to controvert the warrant and suppress the evidence on the basis that the warrant was issued on an affidavit containing perjurious statements was denied without a hearing by Hon. William C. Brennan in an order entered January 26, 1972.

On December 29, 1972, the appellate court ordered that the cases of the six petitioners be remitted to the court be-

low for a hearing and a new determination on petitioners' motion to suppress evidence on the ground that statements contained in the affidavit upon which the search warrant was issued were perjurious. The court noted that the burden of proof would be on the appellants and that any fair doubt arising from the testimony at the hearing would be resolved in favor of the warrant [see *People* v. *Alfinito*, 16 N.Y. 2d 181 (1965)].

On June 6, 1973, a hearing was conducted in Supreme Court, Queens County, before Hon. William C. Brennan in accordance with the order of the appellate court dated December 29, 1972.

Patrolman **Lucido Bonino**, Shield No. 7514, 67th Precinct, New York City Police Department, testified that he had been a member of the Police Department for approximately ten years, and that for three of those years he had worked in the area of gambling investigation. Officer Bonino stated that he began work at approximately 8:00 a.m. on the morning of May 18, 1971, and that at 11:10 a.m. he and Officer Fratello approached appellant's (Stanley Sims) house in a private vehicle. He observed Mr. Sims leave his house and enter a 1970 Plymouth. The officers followed Sims to 145-40 New York Boulevard in Jamaica, the residence of Edith and Marvin Cameron. Officer Bonino was asked if he was ever subpoenaed or requested to testify before a federal grand jury in connection with his investigation of Stanley Sims. He refused to answer, invoking his constitutional privilege.

Officer Bonino testified that he was subpoenaed before a federal grand jury but not directly in reference to the Sims

case. The witness said that he arrested Sims along with the other petitioners on May 21, 1971. At the time of the arrest he and his fellow officers seized drugs and money from the Cameron and Sims homes. Officer Bonino refused to answer questions relating to the seizure of drugs or money that was not reported to the Police Property Clerk. He stated that as far as he could recall he wasn't questioned by the federal grand jury regarding the truthfulness of the affidavit that he submitted in order to procure the search warrant in the case at bar. Bonino said that at his direction an affidavit for a search warrant was prepared for the purpose of investigating a policy operation.

Bonino stated that on May 18, 1971, he made certain observations of the Sims home, but he could not remember if he had made notes in his memo book. Bonino said he made observations on May 19, 1971, and put them on a slip of paper which he had in his possession. He wrote in his memo book only that he was in the vicinity of the Sims residence but not all the details surrounding his observations. The officer stated that while observing the Sims address, he and his fellow officer changed vantage points several times. Bonino testified that he and his fellow officer had observed the Cameron house from a parking lot of a supermarket which was directly across the street. Sims and the unidentified driver of the 1970 Plymouth entered the Cameron residence and remained inside the residence for approximately two hours. Officer Bonino stated that while he was observing the Cameron residence he didn't see any policy slips, or hear anyone discussing any bets. Bonino said that the policy is based on the numbers in the third, fifth and seventh races, and that the envelopes could have been bets for the next day or for previous work. The

witness stated that he procured a search warrant for the Sims and Cameron residences and also for the 1970 Plymouth, that he prepared an affidavit when he made the application for the warrant and that he swore to the truth of the statements contained in the affidavit before Judge Tsoucalas.

**Henry Schnitzer**, residing at 253 Broadway, New York City, testified that he had been a member of the Bar of the State of New York for over thirty years, and a member of the New York City Police Department for six years preceding his law career. During his tenure in the Police Department, he had been sworn as an expert to testify in cases involving policy operations. Mr. Schnitzer stated that no one places policy bets after the third race on a given day and that no special envelopes were used in a policy operation.

**Edith Cameron**, one of the petitioners, residing at 145-40 New York Boulevard, Springfield Gardens, New York, testified that between 11:30 a.m. and 2:30 p.m. on the 18th of May, 1971, only Stanley Sims came to her residence. She stated that the remaining petitioners joined Sims that evening at her home. On the 19th of May only Kenneth Davis and Robert Williams came to her house.

On cross-examination, Edith Cameron testified that she pleaded guilty to the crime of criminal possession of gambling records in the second degree in the case which was the subject of the hearing.

**Jennie Sims**, one of the petitioners, residing at 197-01 116th Avenue, St. Albans, New York, testified that no one

came to her house between the hours of 2:55 p.m. and 3:30 p.m. on the 18th, or 19th of May, 1971.

On cross-examination, Mrs. Sims testified that she had pleaded guilty to criminal possession of gambling records in the second degree.

The order and opinion of Mr. Justice Brennan, dated August 14, 1973, denying the petitioners' motion to controvert the warrant and suppress the evidence seized thereby, is included as section "A" of the petitioners' appendix.

## POINT ONE

**No question concerning the constitutional right to confront witnesses is properly before this Court.**

During the course of a hearing on a motion to controvert a search warrant and to suppress the evidence seized thereby, the police officer, who swore to the truth of the information contained in the affidavit on which the warrant was based, invoked his constitutional right not to incriminate himself when asked certain questions. The petitioners contend that the claim of testimonial privilege by the affiant officer unduly restricted their right to cross-examine the witness and, therefore, violated their constitutional right to confront the witnesses against them. The petitioners also argue that a police officer, acting as an agent of that state, could not claim testimonial privilege and that, by allowing him to do so, the state wrongfully withheld evidence of its own agent's corruption.

Essential to the jurisdiction of this Court under 28 U.S.C. §1257(3) is a requirement that the substantial fed-

eral questions advanced by the petitioners must have been properly raised in the state court proceedings [*Michael* v. *Louisiana*, 350 U.S. 91, 93 (1955); *Parker* v. *Illinois*, 333 U.S. 571, 574 (1948). Absent any indication that the appellate procedure of the state did not provide a reasonable opportunity to the petitioners to assert their constitutional claims, the petitioners have the burden of showing that they raised the issues [*Ungar* v. *Sarafite*, 376 U.S. 575, 582-3 (1964); *Beck* v. *Washington*, 369 U.S. 541, 549-50 (1962)]. Furthermore, the claims of federal right must be presented to the state court with fair precision and the record must show that the petitioners either expressly raised the issues or clearly intended to do so [*Street* v. *New York*, 394 U.S. 576, 581-82 (1969); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)].

Following a hearing on the motion to controvert the search warrant in the instant case on the ground that the affidavit of the police officer underlying the warrant contained perjurious statements, the trial court denied the motion, rejecting the petitioners' sole contention that when the officer claimed his testimonial privilege, an admission of perjury was inherent therein, and that, therefore, they had met their burden of proof on the motion to controvert. This was also the sole issue included in the petitioners' brief to the intermediate appellate tribunal and the opinion of the appellate court makes clear that it was the only issue considered by that court in affirming the order of the trial court. The Court of Appeals of the State of New York declined hearing the case.

It is clear, then, that the issues involving the confrontation of witnesses are raised for the first time in this Court,

never having been raised in any state court proceeding. Under these circumstances, the issues are deemed waived [*Street* v. *New York, supra; Ungar* v. *Sarafite, supra*].

## POINT TWO

**The case presents no substantial federal question requiring resolution by this Court.**

Even if the issues advanced by the petitioners with respect to the right to confront witnesses were properly before this Court, it would be unnecessary for the Court to exercise its jurisdiction both because of previous decisions of this Court and because the resolution of the instant case hinges upon a determination of its facts.

Recognizing that the privilege against self-incrimination is a personal, substantive right that is unequivocal and without exception, this Court on numerous occasions has declared that the right must be liberally construed in favor of the right it is intended to secure [*In re Gault*, 387 U.S. 1 (1967); *Spevak* v. *Klein*, 385 U.S. 511 (1967); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Ullman* v. *United States*, 350 U.S. 422, rehearing denied 351 U.S. 928 (1956); *Quinn* v. *United States*, 349 U.S. 155 (1955); *Hoffman* v. *United States*, 341 U.S. 479 (1951); *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892)]. Thus, the contention of the petitioners that a police officer should not be permitted to invoke the privilege against self-incrimination has specifically been rejected by this Court [*Garrity* v. *New Jersey*, 385 U.S. 493 (1967)]. Since the state could not compel the officer to incriminate himself, inasmuch as the privilege exists to protect the individual

from the force of the state, it necessarily follows that the state cannot, as petitioner contends, be charged with the withholding of evidence involving the alleged corruption of its agents.

The sole issue in this case is whether the petitioners were deprived of their constitutional right to confront witnesses against them when the police officer witness invoked his testimonial privilege.

While the constitutional right of an accused to confront witnesses against him includes the right to effective cross-examination [*Pointer* v. *Texas,* 380 U.S. 440 (1965)], reversible error is not invariably committed whenever a witness claims his constitutional privilege not to answer questions which might tend to incriminate him [*Namet* v. *United States,* 373 U.S. 179, 185-186 (1963); *United States* v. *Cardillo,* 316 F. 2d 606 (2d Circuit, 1963), *cert. denied* 375 U.S. 882]. Rather, it is necessary to look to the circumstances of each case to determine whether the claim of testimonial privilege substantially curtailed the right to effective cross-examination [*Namet* v. *United States, supra*]. A determination of whether a claim of testimonial privilege substantially impairs the right to cross-examination depends upon an analysis of the purpose of the questions asked and the role which the answers, if given, might have played in the defense [*Fountain* v. *United States,* 384 F. 2d 624 (5th Circuit, 1968), *cert. denied sub nom. Marshall* v. *United States,* 390 U.S. 1005].

In the instant case, the trial court found, *as a matter of fact,* that the affiant officer invoked his right against self-incrimination only when asked about his conduct in con-

nection with the execution of the warrants and not with respect to the affidavit preceding it. This finding of fact was affirmed in the opinion of the intermediate appellate tribunal. Thus, the state courts found that the police officer witness did not claim his testimonial privilege with regard to the critical issue of perjurious statements in the affidavit, but only with regard to the collateral issue of the execution of the warrant, a factor which merely bore upon the witness' credibility. The courts have uniformly held that a claim of privilege which goes only to a collateral issue in the case does not amount to an undue restriction of the right to confront witnesses [*State* v. *McKuin*, 434 F. 2d 391 (8th Circuit, 1970), *cert. denied*, 401 U. S. 911; *United States* v. *Brickley*, 426 F. 2d 680 (8th Circuit, 1970), *cert. denied* 400 U.S. 826; *United States* v. *Norman*, 402 F. 2d 73 (9th Circuit, 1968), *cert. denied* 397 U.S. 938; *Fountain* v. *United States*, 384 F. 2d 124 (5th Circuit, 1968), *cert. denied sub nom. Marshall* v. *United States*, 390 U.S. 1005; *United States* v. *Aiken*, 373 F.2d 294 (2d Circuit, 1967), *cert. denied* 389 U.S. 833; *United States* v. *Collier*, 362 F. 2d 135 (7th Circuit, 1966), *cert. denied* 385 U.S. 977; *Coil* v. *United States*, 343 F. 2d 573 (8th Circuit, 1966), *cert. denied* 382 U.S. 821; *United States* v. *Cardillo*, 316 F. 2d 606 (2d Circuit, 1963), *cert. denied* 375 U.S. 882].

## POINT THREE

**The finding of probable cause for the issuance of the search warrant is in accord with prior decisions of this Court.**

The petitioners contend that the search warrant in the instant case was based upon an affidavit which contained insufficient facts upon which to base a finding of probable cause.

It is well settled that, while mere suspicion without supporting facts will not support the issuance of a search warrant, the requisite standard of probable cause is met by facts which demonstrate only the probability, and not a *prima facie* showing, of criminal activity [*Spinelli* v. *United States,* 393 U.S. 410, 419 (1969); *Aguilar* v. *Texas,* 378 U.S. 108, 112 (1964)]. Furthermore, this Court has indicated that a reviewing court should give deference to the determination of the independent magistrate and that marginal cases should be resolved in favor of the warrant [*Spinelli* v. *United States, supra,* at 419; *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965); *Jones* v. *United States,* 362 U.S. 257 (1960)].

The affidavit of the police officer in the instant case clearly indicates that all the affirmative allegations contained therein, with the possible exception of the fact that Stanley Sims was a "known gambler," were based entirely upon the personal observations of the affiant. These observations (Petitioners' Appendix "D") disclose a pattern of identical behavior over a period of days which included the passage of brown envelopes which the affiant,

from his expertise in the field of policy operations, knew were the kind of envelopes used by policy collectors.

This pattern of activity, which could properly be characterized as "abnormal activity," when tested by common sense in a realistic fashion, provided a substantial basis for the magistrate to conclude that there was a sufficient probability of criminal activity to justify the issuance of a warrant [*Spinelli* v. *United States, supra,* at 415; *Aguilar* v. *Texas, supra,* at 111; *United States* v. *Ventresca, supra,* at 108].

## Conclusion

***The petition for a writ of certiorari should be denied in all respects.***

Respectfully submitted,

NICHOLAS FERRARO
*District Attorney*
Queens County

CORNELIUS J. O'BRIEN
CHARLES M. NEWELL
Assistant District Attorneys
*Of Counsel*

November, 1974